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No.

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1994

Jane M. Richards, f/k/a Jane M. Morgan,
Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER AN OVERPAYMENT OF TAXES PROPERLY DETERMINED BY THE TAX COURT IS REFUNDABLE TO A TAXPAYER WHO DID NOT FILE A TAX RETURN, WHERE THE NOTICE OF DEFICIENCY IS MAILED MORE THAN TWO YEARS BUT LESS THAN THREE YEARS AFTER THE DATE THE SUBJECT TAX RETURN WAS DUE TO BE FILED, AND THE TAXES ARE DEEMED TO HAVE BEEN PAID.

LIST OF PARTIES

The parties to the instant proceedings are Jane M. Richards, petitioner, and the Commissioner of Internal Revenue, respondent. The parties at the United States Tax Court for this action were:

Jane M. Richards v. Commissioner of Internal Revenue, T.C.M. 1993-102

Petitioner: Jane M. Richards
Respondent: Commissioner of Internal Revenue

There are no other known parties in interest.

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United States of America,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner Jane M. Richards prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Tenth Circuit entered in this matter on October 5, 1994. (Appendix A). Petitioner filed a timely Petition for Rehearing with Suggestion for Rehearing En Banc which was denied by the Tenth Circuit Court of Appeals on December 15, 1994. (Appendix B).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (App. A, *infra*, 1a) is reported at 37 F.3d 587, 94-2 U.S.T.C. ¶50,542 (10th Cir. 1994). The Order of the Tenth Circuit denying Richards' Petition for Rehearing (App. B, *infra*, 11a) is not reported.

The proceeding in the United States Tax Court is reported at T.C.M. 1993-102 (App. C, *infra*, 13a).

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit (App. A, *infra*, 1a) was filed October 5, 1994, and Richards' timely Petition for Rehearing was denied December 15, 1994. This Court has jurisdiction to review the judgement and opinion of the Court of Appeals pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTES INVOLVED

The pertinent portions of the statutory provisions relevant to resolution of this case are as follows:

Title 26 U.S.C. (Internal Revenue Code) section 6511:

> (a) PERIOD OF LIMITATION ON FILING CLAIM. - Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. * * *

(b) LIMIT ON AMOUNT OF CREDIT OR REFUND. -

* * * * *

(2) limit on amount of credit or refund. -

(A) LIMIT WHERE CLAIM FILED WITHIN 3-YEAR PERIOD. - If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. * * *

(B) LIMIT WHERE CLAIM NOT FILED WITHIN 3-YEAR PERIOD. - If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

* * * * *

Title 26 U.S.C. (Internal Revenue Code) section 6512(b):

(b) OVERPAYMENT DETERMINED BY TAX COURT. -

(1) JURISDICTION TO DETERMINE. - Except as provided by paragraph (3) and by section 7463, if the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an over-

payment of income tax for the same taxable year * * *, in respect of which the Secretary determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of such tax, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer.

* * * * *

(3) LIMIT ON AMOUNT OF CREDIT OR REFUND.--No such credit or refund shall be allowed or made of any portion of the tax unless the Tax Court determines as part of its decision that such portion was paid --

(A) after the mailing of the notice of deficiency,

(B) within the period which would be applicable under section 6511(b)(2), (c) or (d), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment, or

(C) Within the period which would be applicable under section 6511(b)(2), (c) or (d), in respect of any claim for refund filed within the applicable period specified in section 6511 and before the date of the mailing of the notice of deficiency -

(i) which had not been disallowed before that date,

(ii) which had been disallowed before that date and in respect of which a timely suit for refund could have been commenced as of that date, or

(iii) in respect of which a suit for refund had been commenced before that date and within the period specified in section 6532.

STATEMENT OF THE CASE

This dispute involves the 1987 individual income tax liability of Petitioner, Jane M. Richards ("Richards"). Richards' 1987 tax return was due to be filed on April 15, 1988. The amount of $14,131.00 was withheld from Richards' wages during 1987, and she had an amount of $1,158 overwithheld as excess Social Security taxes.

On October 22, 1990, the IRS mailed a notice of deficiency to Richards for the taxable year 1987, in which the IRS determined that there was a deficiency in Richards' income tax for the taxable year 1987, and that Richards was liable for additions to tax pursuant to IRC sections 6651(a) and 6653(a)(1). On January 23, 1991, Richards filed a joint Federal income tax return for the year 1987 with her husband, H. Glenn Richards. This return was accepted as filed by the Internal Revenue Service.

The tax court found there was no deficiency in Richards' tax liability for 1987 and that Richards had actually overpaid her 1987 taxes by $15,289.00. [1] Notwithstanding that Richards had

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[1] The tax court also found that Richards was not liable for additions to tax for the taxable year 1987 under the provisions of 26 U.S.C. §§

(continued...)

overpaid her taxes, the tax court denied her a refund, on the ground that claim for refund was barred by the statute of limitations at the time the IRS issued its notice of deficiency, October 22, 1990.

TENTH CIRCUIT RULING: Richards filed timely appeal to the Court of Appeals for the Tenth Circuit, which affirmed the United States Tax Court in all respects.

The Tenth Circuit noted, correctly, that refund claims cases involve two distinct periods -- (1) the "filing period," and (2) the "refund period." Sections 6511(a) - (b). (App. A, *infra*, p. 4a). In general, the "filing period" is prescribed in section 6511(a), and is the period within which a claim for refund is required to be filed in order to be timely. With respect to the timeliness of Richards' claim for refund, the Tenth Circuit reasoned that under section 6512(b)(3)(B), Richards is "deemed" to have filed a claim for refund on October 22, 1990, the date the IRS mailed the notice of deficiency. According to the Court, the consequence of this interpretation of section 6512(b)(3)(B) was that Richards' "deemed claim" was not filed within 3 years *from the time* [her] return was filed. 26 U.S.C. section 6511(a).]

The applicable "refund period" depends on the "filing period" within which the claim for refund is filed. Section 6511(b)(2). Under section 6511(b)(2)(A), the "refund period" is the three-year period before the refund claim is filed, if the claim is filed "within 3 years from the time the return was filed." Richards was found not to qualify for this refund period, because she had not yet filed her 1987 tax return when the IRS mailed the notice of deficiency. [2] That is, her "deemed claim" was not filed

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[1](...continued)
6651(a) or 6653(a)(1). This finding has no bearing on this case.

[2] If the three year refund period applied, Richards would have been
(continued...)

within 3 years from the time her return was filed. Section 6511(a).

Instead, the Court applied the two-year "refund period" provided in section 6511(b)(2)(B), *viz.*, the two-year period preceding the time the claim was filed. Under this period, Richards' refund was barred, because her "deemed claim" was filed more than two years after the taxes were paid.

REASON FOR GRANTING THE WRIT

THE SPLIT AMONG THE CIRCUIT COURTS OF APPEALS PRESENTS AN IMPORTANT UNRESOLVED QUESTION CONCERNING THE TAX COURT'S AUTHORITY TO ORDER REFUNDS OF OVERPAID INCOME TAXES, AND THE STATUTE OF LIMITATIONS APPLICABLE TO CLAIMS FOR REFUND OF OVERPAID TAXES.

The Circuit Courts are divided with respect to whether an overpayment properly determined by the tax court is refundable to a taxpayer who did not file a tax return in the limited circumstance where the notice of deficiency is mailed more than two years but less than three years after the date the subject tax return was due to be filed. [3]

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[2](...continued)
entitled to refund of the overpaid taxes, whether that period is measured by the notice of deficiency date, October 22, 1990, or the date she actually filed her return, January 23, 1991.

[3] If the notice of deficiency was mailed less than two years after the return due date, an overpayment is refundable whether the applicable "refund period" is two years, per section 6511(b)(2)(B), or three years, per

(continued...)

The Second, Sixth, Seventh, Ninth and Tenth Circuits have all held that an overpayment is barred in these circumstances. *Davison v. Commissioner*, 9 F.3d 1538 (Table), unpublished, (2d Cir. 1993); *Allen v. Commissioner*, 23 F.3d 406 (Table), unpublished, (6th Cir. 1994), aff'g 99 T.C. 475 (1992); *Galuska v. Commissioner*, 5 F.3d 195, 93-2 U.S.T.C. ¶50,537 (7th Cir. 1993); *Rossman v. Commissioner*, unpublished, (9th Cir. 1995); and *Richards v. Commissioner*, 37 F.3d 587, 94-2 U.S.T.C. ¶50,542 (10th Cir. 1994) (the instant case). The Second, Sixth, Seventh, and Tenth Circuits apply the two year "refund period" prescribed in section 6511(b)(2)(B). These courts agree that an overpayment is refundable if a return (and a claim) is filed more than two years late, provided the late return is filed within three years after the return was due. However, where a tax return has not been filed and a notice of deficiency is issued in this 2 - 3 year gap period, they reason that under section 6512(b)(3)(B) the taxpayer is deemed to have filed a claim for refund on the date the IRS issued the notice of deficiency, but, in the absence of a tax return, this "deemed claim" is not filed "within 3 years from the time the return was filed," section 6511(a), with the result that the two year refund period of section 6511(b)(2)(B) applies.

The Ninth Circuit reaches the same result through a different analysis. That court rules that a taxpayer who has not filed a return within two years of the date the taxes were paid is absolutely barred from obtaining a refund, even if a return is subsequently filed within three years of the due date. *Miller v. United States*, 38 F.3d 473, 475 (9th. Cir. 1994). In *Rossman*, the Ninth Circuit applied the *Miller* rule and found that because

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[3](...continued)
section 6511(b)(2)(A). Further, if the notice of deficiency was mailed more than three years after the return due date, the overpayment is not refundable, because the maximum three year refund period will have been exceeded.

Rossman had not filed a return within two years after the taxes were paid, she was barred from obtaining a refund of her overpaid taxes.

The decision of the Fourth Circuit in *Lundy v. IRS*, __ F.3d __, 1995 WL (Lexis) 32012, 95-1 U.S.T.C. ¶50,085 (4th Cir. 1995), conflicts directly with the Second, Sixth, and Tenth Circuits. The Fourth Circuit specifically declined to follow the Tenth Circuit's reasoning in *Richards*, 37 F.3d 587. The Fourth Circuit rejected the "deemed claim" analysis and held that under section 6511(a) "when a taxpayer fails to file a tax return by the due date, he has a three-year window of opportunity to file a tax return and claim his refund." (Slip op. at 2). Because the taxpayer had actually filed his tax return (which also constituted his claim for refund) within this three year window, *i.e.*, within three years of the due date, the court held that he had filed a claim "within 3 years from the time the return was filed," section 6511(a), concluded that the three year refund period prescribed in section 6511(b)(2)(A) applied, and found that he was entitled to refund of his overpaid taxes.

In rejecting the "deemed claim" analysis employed by other courts that have considered this issue, the Fourth Circuit also noted that section 6512(b)(3)(B) does not use the words "deemed" or "considered," which words, or words of similar import, are found throughout the Internal Revenue Code, and concluded that Congress would have used such words if it intended a claim to be "deemed" to be filed. (Slip op. at 4.).

Lundy also conflicts with the Ninth Circuit, although for a different reason. The Ninth Circuit's rule barring refunds to any taxpayer who has not filed a return within two years after payment, *Miller*, 38 F.3d at 475, was specifically rejected by the *Lundy* court. (Slip op. at 12).

Lundy is factually indistinguishable from *Davison*, 9 F.3d 1538 (2d Cir.); *Allen*, 23 F.3d 406 (6th Cir.); *Rossman*, (9th Cir.); and *Richards*, 37 F.3d 587 (10th Cir.). In each of these cases the taxpayers actually filed delinquent tax returns within

three years of the return due dates. Under *Lundy* they would have prevailed, but each of these courts ruled against the taxpayer.

Finally, the *Lundy* court distinguished *Galuska*, 5 F.3d 195, and a prior Fourth Circuit decision, by a different panel, *Anderson v. Commissioner*, No. 93-2501, unpublished, (4th Cir. Sept. 8, 1994), on the ground that in those cases the taxpayers did not actually file their tax returns until more than three years after the return due date. The court concluded that this factual distinction warranted a different outcome. The *Galuska* court, however, expressly adopted the "deemed claim" interpretation of section 6512(b)(3)(B) that the *Lundy* court rejected; hence it conflicts with the Fourth Circuit.

ARGUMENT

The court of appeals incorrectly held that Richards' claim for refund was barred on the date the IRS issued a notice of deficiency because she is deemed to have filed a claim on that date, which was not within two years of the date her taxes were paid. The court of appeals should have held that Richards was entitled to a refund of her overpaid taxes because she actually filed a return (which also constituted a claim for refund) within three years of the date her return was due to be filed.

1. Congress originally intended that taxpayers would have three years from the due date of a tax return to file a refund claim. This intention was not changed when section 6511(a) was amended in 1958.

Congress intended that taxpayers who have not filed timely tax returns would have a three year period (plus extensions of time for filing) within which to file (delinquent) returns and claim refund of their overpaid taxes. When the Internal Revenue Code

of 1954 was first enacted, [4] section 6511(a) provided that refund claims were required to be filed within three years of the date the return was due. [5] There was no requirement to file a tax return; all the statute required was that the claim be filed within three years of the return due date. Under this original statutory scheme, Richards would have been entitled to refund of her overpaid taxes, because she filed her return (which also constituted her claim for refund) on January 23, 1991, which date is within three years of the April 15, 1988 due date of her 1987 tax return.

Section 6511(a) was amended to its present form in 1958. Technical Amendments Act of 1958, Pub. L. 85-866, sec. 82(a), 72 Stat. 1663. S. Rept. 1983, 85th Cong., 2d Sess. (1958), 1958-3 C.B. 1019-1020, 775, 85th Cong., 1st Sess. (1957), 1958-3 C.B. 854-855, 912; *See*, *Allen*, 99 T.C. at 480-81. In reaching its decision, the circuit court (as well as all the other courts that have considered the present issue -- except the Fourth Circuit in *Lundy*), construed only the language as it stood after the

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[4] Ch. 736, 68A Stat. 808.

[5] As originally enacted, section 6511(a) read, insofar as is here relevant, as follows:

> (a) PERIOD OF LIMITATION ON FILING CLAIM. - Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was required to be filed (determined without regard to any extension of time) or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. * * *

Internal Revenue Code of 1954, section 6511(a) (Emphasis added). Only the underlined portion was amended to read "within 3 years from the time the return was filed," and the parenthetical was deleted.

amendment. By failing to examine the original statute, those courts have overlooked what Congress really intended to be the time taxpayers have to file refund claims.

However, as the *Lundy* court demonstrated, that language does not reflect what Congress intended vis-a-vis the tax court's authority to order refunds of tax overpayments, as prescribed in section 6512(b)(3)(B).

The exclusive purpose of the amendment to section 6511(a) was to *extend* the limitations period within which late filers could file refund claims. [6] To achieve this purpose, Congress changed the measuring date for determining timeliness of refund claims from three years *after the due date* to three years *after the date the return was filed*. Where a return is filed after the due date, the statute of limitations on *assessment* is measured from the date the return is actually filed. Section 6501(a). The amendment conformed the limitations period for a late return with the three years available to the government for additional tax assessments, which was measured from the date the late return was actually filed. Thus, Congress meant to allow *additional time* for filing refund claims in cases where returns had not been filed on time.

There is no evidence and no indication in the legislative history of this amendment that Congress intended to make any change in the tax court's authority to determine refundability of overpaid taxes, or otherwise to cause any change in the operation of section 6512(b)(3)(B). In fact, section 6512 is not even mentioned in the legislative history. The circuit court's decision *shortens* the time within which a claim must be filed (where a return has not been filed), for a narrowly circumscribed class of taxpayers, *viz.*, those who have overpaid their taxes, have not

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[6] In this regard, it is noteworthy that before the amendment both periods were in conformity *with respect to the first three years after the return due date*. Contrary to Congress' intent, the circuit court's decision creates non-conformity where there was conformity before.

filed a return, have had a notice of deficiency issued more than two and less than three years after the due date, and have elected to litigate their tax liabilities in the tax court. [7] There is nothing to indicate that Congress intended to single out this limited class of taxpayer for special, more restrictive, treatment, and this interpretation is inconsistent with this clearly expressed intention of Congress. Because the statute already provided a three year period without regard to whether a return was filed, the context of this amendment clarifies that it was only intended to affect delinquent tax returns. There is simply no case in which the limitations period under either the original or the amended statutory language of section 6511(a) can be less than three years from the due date of the return.

The circuit court did not consider the original statutory language or the purpose of the amendment in analyzing what Congress intended. Although it found "the statutes and their cross-references somewhat convoluted" (App. A, *infra*, p. 10a), it did not consider how the original statute or the stated purpose of the amendment could shed light on divining that touchstone of statutory interpretation -- Congressional intent. Even "plain meaning" cannot survive inconsistency with the intentions of Congress. See *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). Further, the circuit court agreed that "the

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[7] The period is shortened by the effect of the "deemed claim," which is exclusively a creature of section 6512(b)(3)(B). In the district court (or the Court of Federal Claims), section 6512(b)(3)(B) has no application, and there is no provision pursuant to which a claim can be "deemed" filed. Thus, in any litigation *other than in the tax court*, limitations will be evaluated solely by reference to section 6511. The circuit court acknowledged that Richards would have been entitled to the disputed refund if she had brought suit in the district court, because she actually filed a refund claim within the specified three year period. (App. A, *infra*, p. 9a). *See also Lundy*, slip op. at 2-3; *Curry v. United States*, 774 F.2d 852, 85-2 U.S.T.C. ¶9743 (7th Cir. 1985); *Risman v. Commissioner*, 100 T.C. __, No. 13 (1993). *Contra, Miller*, 38 F.3d at 475.

entire scheme of limitations on taxpayer refunds" was a "trap for the unwary," and noted "in this particular context [*i.e.*, the context of taxpayers claiming from the government refunds of taxes they have overpaid], we believe the tax code should provide a layperson with *the clearest guidance possible*." (App. A, *infra*, p. 3a, n. 3) (Emphasis added).

Rather than resolve the convoluted scheme in a manner that would provide clear guidance to all taxpayers and allow them to avoid the traps hidden in this statutory scheme, the circuit court perpetuated the imprecision inherent in these "convoluted" provisions. In fact, the court specifically noted that Richards fell victim to the trap: "If Ms. Richards' claim had been brought in federal district court, we would have agreed with her position that the three-year refund period applied under §6511(b)(2)(A) and the taxes she overpaid would have been refundable." (App. A, *infra*, p. 9a). Congress did not intend to create a statutory scheme in which there are different limitations periods depending factors both within the taxpayer's control, *e.g.*, choice of forum, and outside the taxpayer's control, *e.g.*, whether or when a notice of deficiency is issued

Congress also did not intend to create a scheme that fails to give proper guidance to taxpayers about the limitations period governing refund claims, and to penalize those who make wrong decisions by causing them to forfeit refunds they could have gotten merely by pursuing their refund in a different forum.

2. The circuit court erred in holding that a claim for refund is "deemed filed" on the date a notice of deficiency is issued.

The circuit court also incorrectly found that under section 6512(b)(3)(B) a taxpayer is deemed to have filed a claim for

refund on the date a notice of deficiency is issued. [8] The court then gave substantive effect to this "deemed claim," and held that the two year refund period applied because the deemed claim was [deemed] filed (1) at a time when no return had been filed, and (2) more than two years after the taxes were paid. The court also held that even though Richards actually filed her return/claim on January 23, 1991, that return could not be considered because it was filed *after* the deemed claim. (App. A, *infra*, p. 6a).

The circuit court did not analyze whether the tax court was correct in its determination that a claim is deemed filed under section 6512(b)(3)(B) on the date a notice of deficiency is issued, instead finding that question "undisputed." Contrary to the circuit court's characterization, Richards did dispute this question, and continues to do so. See note 8, *supra*.

Congress did not intend that a claim is deemed to have been filed when a notice of deficiency is issued. Section 6512(b)(3)(B) does not contain the word "deemed," or any other word of like import. Congress knows very well how to use the word "deemed" or similar words when that is what it intends. The fact that Congress did not say a claim is deemed filed can

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[8] In the circuit court, this was a disputed matter, and, as can be seen from the Fourth Circuit's opinion in *Lundy*, it may be critical to the outcome. Although the ircuit court stated "It is undisputed that in tax court, Ms. Richards' claim was deemed filed on the date she received her notice of deficiency, October 22, 1990, although her return was filed on January 23, 1991" (App. A, *infra*, p. 6a), Richards vigorously contested the tax court's determination that a claim is deemed filed under section 6512(b)(3)(B). (See Br. Apl't, pp. 17-18, 21, 24-25 and Repl. Br. Apl't, p. 1, n. 1).

only mean it did not intend that result. [9] *See, Lundy*, slip op. at 4.

3. The circuit court's distinction between "return" and "claim" undermines Congress' intent.

Section 6512(b)(3)(B) limits the amount of overpaid tax that can be refunded by the tax court to the amount that would have been refundable if a claim for refund had been filed on the date the notice of deficiency was mailed. The plain fact is that if Richards had actually filed a claim for refund on that date she would have received the refund here at issue. [10]

First, there can be no dispute that section 6512(b)(3)(B) refers to a claim that would have been legally sufficient if it were actually filed. See, *e.g.*, *Beckwith Realty, Inc. v. United States*, 896 F.2d 860, 90-1 U.S.T.C. ¶50,150 (4th Cir. 1990) (claim for refund was legally insufficient because it failed to meet specificity requirement of 26 C.F.R. section 301.6402-2(b)(1)).

Here, Richards had not filed her 1987 tax return on the date the notice of deficiency was mailed. In those circumstances, Treasury regulations, 26 C.F.R. section 301.6402-3(a)(1), mandate that a refund claim "shall be made on the appropriate

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[9] The word "deemed" is used in the Internal Revenue Code at least 295 times. Indeed, Congress has specifically provided for "deemed" filed dates for other limitations purposes. See sections 6501(b) and 6513. Although the operative word used in sections 6501(b) and 6513 is "considered," the headings for those sections use the synonym "deemed." (The word "considered" also is not used in section 6512(b)(3)(B)).

[10] In fact, the circuit court acknowledged that Richards would have received her refund had she litigated her tax liability in the district court instead of the tax court, even though her refund claim was not filed until three months *after* the notice of deficiency was issued. (App. A, *infra*, p. 9a). Hence, she would have received it if she had filed it on the earlier date.

income tax return." [11] The word "shall" indicates the mandatory nature of this regulation. See *Anderson v. United States*, ___ F.3d _____, 95-1 U.S.T.C. ¶50,048 (9th Cir. 1995) ("That Congress intended to impose a mandatory time limit of 40 days from public notice to sale is shown by use of the word shall" in section 6335(d)). If Richards had filed a claim on the notice of deficiency date, in accordance with this regulation, she would have had to have filed a return. Accordingly, the "claim" to which section 6512(b)(3)(B) refers must, at the very least, *include* a claim that complies with this regulation. [12]

This analysis is supported by the historical development of sections 6511 and 6512. At the time sections 6511 and 6512 first appeared in the Code, section 6511 did not differentiate between returns and claims, hence use of the word "claim" in section 6512(b)(3)(B) could not have been intended to mean one and not

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[11] Where a return has already been filed, the regulations provide that a "claim for refund shall be made on Form 1040X ('Amended U.S. Individual Income Tax Return')." 26 C.F.R. section 301.6402-3(a)(2).

[12] Whether it is even possible, in those circumstances, to file a claim that does not also constitute a return is an interesting question (and somewhat metaphysical -- being somewhat reminiscent of the "chicken and egg" argument), which is unnecessary for the Court to address in this case. Compare 26 C.F.R. section 301.6402-2 and *United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 272, 2 U.S.T.C. ¶708 (1931); *Beckwith Realty, Inc. v. United States*, 896 F.2d 860, 90-1 U.S.T.C. ¶50,150 (4th Cir. 1990), setting forth minimum requirements for refund claims, with *Florsheim Brothers Drygoods Co. v. United States*, 280 U.S. 453 (1930); *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172, 35-1 U.S.T.C. ¶9003 (1934); *United States v. Klee*, 494 F.2d 394, 74-1 U.S.T.C. ¶9412 (9th Cir. 1974); *Beard v. Commissioner*, 82 T.C. 766, 777-780 (1984), providing that no specific form is required to constitute a return and describing what does constitute a return. It appears that the minimum requirements are coextensive, and that any valid claim would, as a matter of law, also satisfy the requirements to constitute a return. For example, both must contain sufficient information to calculate a tax liability, and both must be signed under penalty of perjury.

the other. Section 6512(b)(3)(B) [13] was derived from similar provisions in earlier statutes and appeared in the 1954 Code with "no material changes from existing law." H.R. Rept. No. 1337, 83d Cong., 2d Sess. A415 (1954 U.S. Code Cong. & Ad. News 4017, 4563). *Accord*, S. Rept. No. 1622, 83d Cong., 2d Sess. 586 (1954 U.S. Cong. & Ad. News 4621, 5236); *Lundy*, __ F.3d ___, slip op. at 6. At that time, section 6511(a) provided that a claim was required to be filed within three years after the return due date, or within two years after the taxes were paid, whichever period expired later. There was no circumstance in which a taxpayer *ever* had less than three years from the return due date to file a claim. Further, it was irrelevant whether a return had been filed -- all that was necessary, under this original statute, was to file "a claim," which was not defined. Even though the words "return" and "claim" appeared close together in the original version of section 6511, the reference in section 6512(b)(3)(B) to "claim" could not have been intended to differentiate between claims and returns, because it did not matter. Accordingly, Congress did not intend to make any distinction, in section 6512(b)(3)(B), between a "claim" and a "return."

Additional support is found in the development of the regulation, 26 C.F.R. section 301.6402-3 (specifying how refund claims are made). Congress directed the Secretary to make appropriate regulations governing claims for refund. *See* section 7422(a) (Suit for refund cannot be maintained "until a claim for refund or credit has been duly filed with the Secretary, according

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[13] Sec. 6512(b)(3), formerly sec. 6512(b)(2), was redesignated by the Technical and Miscellaneous Revenue Act of 1988, Pub. L. 100-647 (TAMRA), sec. 6244(a), 102 Stat. 3750, effective for overpayments determined by the Tax Court which had not been refunded on the 90th day after November 10, 1988. See TAMRA sec. 6244(c).

to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.") (Emphasis added). [14]

The IRS first promulgated regulations under section 6402 in 1954. T.D. 6119, 1955-1 C.B. 145. Those regulations, 26 C.F.R. section 301.6402-3(a), provided "in the case of income tax, claims for refund may not only be made on Form 843 but may also be made on Form 1040, Form 1040A * * *, or an amended return." The IRS recognized early on that "claim" included a return/claim, *i.e.*, a claim made on an original return. This regulation was amended in 1970, T.D. 7057, 1970-2 CB 289, to provide, at 26 C.F.R. section 301.6402-3(a)(1): "In the case of income tax, claims for refund may not only be made on Form 843 but may also be made on any individual * * * income tax return, or on any amended income tax return."

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[14] These regulations, issued under the specific authority of section 7422(a), are so-called "legislative regulations," *see Brown-Forman Corp. v. Commissioner*, 955 F.2d 1037, 92-1 U.S.T.C. ¶50,075 (6th Cir. 1992) *cert. denied* 113 S.Ct. 87 (1992), which have "the same effect as a valid statute." *CWT Farms, Inc. v. Commissioner*, 755 F.2d 790, 800 (11th Cir. 1985) *cert. denied* 477 U.S. 903 (1986). See also *Water Quality Ass'n Employees Benefit Corp. v. United States*, 795 F.2d 1303, 1305 (7th Cir. 1986); *Anderson, Clayton & Co. v. United States*, 562 F.2d 972, 976 (5th Cir. 1977) *cert. denied* 436 U.S. 944 (1978). Even if these regulations were considered as "interpretive regulations," they would be entitled to "great weight." See *Water Quality Ass'n Employees Benefit Corp.*, 795 F.2d at 1305; *Caterpillar Tractor Co. v. United States*, 589 F.2d 1040, 1043 (Cls. Ct. 1978). Interpretive regulations are those not specifically authorized by an originating statute, but finding their authority in section 7805(a), which permits the IRS to promulgate "all needful rules and regulations for the enforcement of this title * * *." See *Gehl Co. v. Commissioner*, 795 F.2d 1324, 1328 (7th Cir. 1986). The Tax Court has held that "[a]n interpretive regulation must be sustained unless unreasonable and plainly inconsistent with the revenue statute." *Shereff v. Commissioner*, 77 T.C. 1140, 1143 (1981). It is plain that these regulations, which specify the manner in which refund claims are to be made, are reasonable, and no reason has been articulated to justify departing from the regulatory requirements.

The regulation was amended to its present form, requiring claims to be made on a tax return where none has yet been filed, for claims filed after June 30, 1976, by T.D. 7410, 1976-1 C.B. 384. The preamble to this Treasury Decision provided:

> [t]he amendment provides for the use of income tax returns or amended income tax returns * * * rather than Form 843, as the means for filing claim for credit or refund * * *. (Emphasis added).

Under this most recent iteration of the regulation, a claim *must* be made on an original return, if a return has not yet been filed, and it is incorrect to interpret section 6512(b)(3)(B) as *excluding* that type of claim. At a minimum, the concept of a "claim" has always *included* a return/claim, not excluded it, and today it is the exclusive method for filing a claim. There is no evidence that Congress intended a special, and different, meaning for the term "claim" in section 6512(b)(3)(B) than elsewhere in the Code.

The preceding analysis establishes that the word "claim" in section 6512(b)(3)(B) was not originally intended to distinguish between a "return" and a "claim." When Congress amended section 6511(a) in 1958, it did not intend to introduce a new definition of "claim" in a section it did not even address.

First and foremost, section 6512(b)(3)(B) has not been amended in any material manner since originally enacted in 1954. There is simply no basis even to consider that Congress' intention as to the meaning of a word used in that section changed because some other section of the Code was changed, and nothing in either section 6511 or 6512 indicates the meaning of any word was modified.

Congress was not concerned with the definition of the word claim, and was not even remotely concerned with section 6512. The stated purpose of the amendment to section 6511(a) was "to conform the period of limitations for filing a claim for

refund with the period presently allowed for making an assessment." S. Rept. 1983, 85th Cong., 1st Sess. (1957), 1958-3 C.B. 854. The only change to section 6511(a) was to change the three year period for filing claims from "within 3 years from the time the return was required to be filed (determined without regard to any extension of time)" to "within three years from the time the return was filed." By definition, these changes can apply *only* in the case of a late return, because a claim filed within three years of a timely return will necessarily be filed within three years of the due date. [15] Because Congress clearly stated that its intention was to provide *additional* time for filing a refund claim, the conclusion that the amendment actually *truncates* the time within to file a claim is unsupportable. This contravention of Congressional intention is further illustrated by the drastic consequences that attach; Richards stands to lose the right to obtain a refund of more than $15,000 merely because she sought relief in the wrong forum. Congress did not intend to cause forfeiture of overpaid taxes that would have been refundable before the amendment. This Draconian result is avoided simply by paying heed to the unambiguous intention expressed in the original statute -- that taxpayers always have *at least three years* from the due date within which to file a refund claim -- and to the intent of the amendment -- to give more time to file refund claims were returns are filed late. In this regard, we note, specifically, that postponing the beginning of the three year period under section 6511(a), which is the real, intended effect of the amendment, does not give taxpayers any additional time within which to file for refund of taxes already paid on the due date of the return. Section 6511(b)-(2)(A) still limits the amount refundable to taxes paid within three years before the claim is filed. See *Mills v. United States*, 93-1

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[15] See section 6501(b)(1), providing that returns filed before the due date are deemed filed on the due date.

U.S.T.C. ¶50,019 (E.D. Tx. 1992). Thus, the claim must still be filed within three years of payment, i.e., the due date. [16]

Finally, we have discussed, above, the history of the IRS's regulations governing the filing of claims for refund. After considerable development, presumably thorough deliberations, and 22 years of experience during which claims were permitted on either a tax return or Form 843, the IRS determined that the method for filing claims for credit or refund of *income taxes*, where a return has not been filed, is to file a return. The courts should not substitute their own construction for this well considered, developed and reasonable agency determination. See *Peoples Federal Savings & Loan Ass'n of Sidney v. Commissioner*, 948 F.2d 289, 300, 91-2 U.S.T.C. ¶50,541 (6th Cir. 1991). The last amendment to the regulation was made 18 years *after* section 6511(a) was amended in 1958. This regulation is inconsistent and incompatible with the notion that section 6511(a) contemplates that a claim and a return are not the same (where a return has not yet been filed), and that a "claim" filed before a return would be ineffective to toll the limitations period. (See note 12, *supra*, questioning whether it is even possible to file a claim that would not also constitute a return, where a return has not previously been filed).

CONCLUSION

The decision of the Tenth Circuit conflicts directly with the decision of the Fourth Circuit in *Lundy*, and the two cases are factually indistinguishable. The Tenth Circuit's ruling is also consistent, on the same facts, with decisions of the Second and Sixth Circuits, and with the outcome in the Ninth Circuit even though that court utilizes different rationale. Further, the Tenth Circuit's reasoning is the same as that of the Seventh Circuit and

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[16] Although extended due dates are now taken into account. Section 6511(b)(2)(A).

the Fourth Circuit, where the only factual difference is that the taxpayer did not file a tax return until more than three years from the due date of the return.

The Petitioner submits that her Petition for a Writ of Certiorari to the United States Courts of Appeals for the Tenth Circuit should be granted to resolve this conflict.

Respectfully Submitted,

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March ____, 1995

(Appendices follow)

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JANE M. RICHARDS, f/k/a JANE M. MORGAN, Petitioner-Appellant, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	No. 93-9016

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES TAX COURT (T.C. No. 1564-91)

David M. Kirsch, San Jose, California, for Petitioner-Appellant

Regina S. Moriarty (Michael L. Paup, Acting Assistant Attorney General, and Richard Farber with her on the brief), Tax Division, Department of Justice, Washington, D.C., for Respondent-Appellee.

BEFORE: **BALDOCK, McWILLIAMS** and **BRORBY,** Circuit Judges

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BRORBY, Circuit Judge.

Ms. Richards appeals the judgment of the United States Tax Court denying her claim for a refund of taxes withheld in 1987. The narrow issue presented in this case requires us to interpret two specific sections of the Internal Revenue Code ("the Code"), 26 U.S.C. §§6511 and 6512(b)(3)(B), to determine whether Ms. Richards' refund claim was timely. We have jurisdiction to review a final decision of the tax court under 26 U.S.C. §7482(a)(1) and we affirm.

BACKGROUND [1]

Ms. Richards, an accountant, did not initially file a tax return for the 1987 calendar year. Federal income taxes and Social Security taxes were withheld for that tax year, however, and under applicable law, those taxes were deemed paid on April 15, 1988. See 26 U.S.C.A. §6513(b)(1). Because Ms. Richards had not filed her return, the Internal Revenue Service ("Service") was uncertain whether she was deficient in her 1987 tax payments. On October 22, 1990, the Service mailed her a notice of deficiency. In response to this notice, Ms. Richards eventually filed a tax return on January 23, 1991, for the 1987 year, correctly showing she had in fact overpaid her taxes and claiming a refund.

The Service refused Ms. Richards' refund claim and she thereafter sought relief in tax court. The issue before the tax court was whether Ms. Richards' refund claim was timely. The tax court, relying on the weight of past tax court decisions, concluded

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[1] The material facts were stipulated to before the tax court pursuant to Tax Court Rule 91, and accordingly, they are undisputed.

Ms. Richards' claim was untimely and therefore she was not entitled to a refund under the applicable statutes. It is this ruling of law by the tax court that forms the basis for Ms. Richards' appeal.

DISCUSSION

We review tax court rulings "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." 26 U.S.C.A. §7482(a)(1); accord, *Houston Oil and Minerals Corp. v. Commissioner*, 922 F.2d 283, 285 (5th Cir. 1991). Thus, the tax court's interpretation of the statutes in question is subject to de novo review. See *NCAA v. Commissioner,* 914 F.2d 1417, 1420 (10th Cir. 1990).

I.

Our inquiry focuses on the statutory limitations periods for taxpayer refund claims and the respective triggering events in both federal district court and tax court. [2] In order to understand the issue presented in this appeal, an overview of the relatively tedious statutes at issue is appropriate since the starting point for our analysis is the statutory language. [3] See *Central Trust Co. v.*

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[2] "The taxpayer has three forums in which he may initiate litigation involving tax matters. They are the district courts, Claims Court or Tax Court." Mertens, *Law of Federal Income Taxation*, §58A.05 (1992). In the present case, we only concern ourselves with the relationship between the federal district courts and the tax courts.

[3] Ms. Richards argues the tax court statutes are "trap[s] for the unwary." We find little difficulty agreeing with this characterization relative to the entire scheme of limitations on taxpayer refunds at issue in this case. Having reviewed Congress' various attempts over the last sixty years to draft limitations on refund claims, we find the present state of the law still leaving something to be desired. While our function is limited to interpreting the laws as written, we note that as the clarity of Congress'

(continued...)

Official Creditors' Comm. of Geiger Enters., 454 U.S. 354, 359-60 (1982) (*per curiam*) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

A.

The Code imposes general limitations on both the period for filing a refund claim (the "filing period") and on the period for calculating the amount of refund (the "refund period"). 26 U.S.C.A. §6511(a)-(b). The analysis is further compounded because, as we discuss below, these limitations periods have different triggering events depending on whether the claim is filed in federal district court or tax court. [4] Subsection 6511(a) defines the filing period as follows:

> Claim for . . . refund of an overpayment of any tax . . . shall be filed by the taxpayer within 3 years from the time the return was filed . . . or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.

26 U.S.C.A. §6511(a).

In general, a court reviewing a refund claim must first examine whether a taxpayer has satisfied the statutory filing

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[3](...continued)
intent increases, the likelihood of erroneous statutory interpretation by the judiciary decreases. Moreover, in this particular context, we believe the tax code should provide a layperson with the clearest guidance possible.

[4] "The Tax Court is a court of limited jurisdiction." *Commissioner v. McCoy*, 484 U.S. 3, 7 (1987); accord, *Alford v. Commissioner*, 800 F.2d 987, 988 (10th Cir. 1986). Section 6512(b)(1) is an affirmative grant of subject matter jurisdiction from Congress to the tax court that permits the tax court to adjudicate taxpayer refund claims, subject to any limitations embodied in other provisions of the Code.

period pursuant to §6511(a). If a taxpayer has satisfied the filing period, then one refund period applies; if the filing period has not been satisfied, then a different, and shorter, refund period applies. See 26 U.S.C.A. §6511(b)(2)(A)-(B).

The refund period in §6511(b) restricts the taxpayer's ability to recover overpaid taxes to either the two-year or three-year period immediately preceding the filing of the refund claim. Which period applies is dependent upon the filing period the taxpayer has satisfied. "If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of . . . refund shall not exceed the portion of the tax paid within the [three] years immediately preceding the filing of the claim." 26 U.S.C.A. §6511(b)(2)(A). Alternatively, "[i]f the claim was not filed within such 3-year period, the amount of the . . . refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim." 26 U.S.C.A. §6511(b)(2)(B).

Under §6511(a), the benchmark date for measuring the triggering events of the relevant periods in federal district court is the date on which the taxpayer actually filed a return. Under §6512(b)(3)(B), [5] however, if the suit is filed in tax court, the Commissioner does not rely on the date the return was actually filed by the taxpayer but instead, focuses on the date the Service mailed the taxpayer a notice of deficiency.

B.

Applying these principles to the case before us, Ms. Richards is deemed to have filed her refund claim on October 22, 1990, the date the Service mailed her a notice of deficiency. See 26 U.S.C.A. §6512(b)(3)(B). The issue then becomes one of determining the appropriate refund period. Section 6512(b)(3)(B) cross-references §6511(b)(2) to determine the refund period.

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[5] The tax court found. and the parties agree, that only subsection (B) of this statute applies and therefore we limit our discussion to that section.

Section 6511(b)(2)(A) provides a three-year refund period, while §6511(b)(2)(B) provides only a two-year refund period. The longer refund period in §6511(b)(2)(A) applies only if the claim for refund was filed "during the 3-year period prescribed in [§6511](a)." If it was not, then the taxpayer is limited to the two-year refund period in §6511(b)(2)(B).

It is undisputed that in tax court, Ms. Richards' claim was deemed filed on the date she received her notice of deficiency, October 22, 1990, although her return was filed on January 23, 1991. As a result, her claim was not filed "within 3 years *from the time* the return was filed." 26 U.S.C.A. §6511(a) (emphasis added). The ordinary understanding of the words "from the time" implies that the taxpayer must file the return *prior* to filing the claim in order to benefit from the three-year refund period. Ms. Richards' return, however, was filed on January 23, 1991, after the date her claim was deemed filed in tax court. Therefore, she cannot avail herself of the three-year refund period under §6511(b)(2)(A), and she is necessarily limited to the two-year refund period under §6511(b)(2)(B).

Under the two-year refund period, Ms. Richards may only obtain a refund for tax payments she made on or after October 22, 1988. By operation of §6513(b)(1), Ms. Richards' 1987 taxes were deemed paid on April 15, 1988, which is outside the two-year refund period. As a result, the tax court correctly held that §6512(b)(3)(B) prohibits her from recovering any overpaid taxes, a result that accords with the ruling of at least [6] one other

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[6] Several other courts of appeals have decided this issue in unpublished opinions. We do not, however, cite those opinions as authority out of deference to the local court rules of those circuits. E.g., *Anderson v. Commissioner*, No. 93-2501 (4th Cir. Sept. 8, 1994) (citation limited by I.O.P. 36.5, 36.6); *Allen v. Commissioner*, 23 F.3d 406 (Table) (6th Cir. 1994) (citation limited by 6th Cir. R. 24(c)); *Davison v. Commissioner*, 9 F.3d 1538 (Table) (2d Cir. 1993) (citation limited by 2d Cir. R. 23); *Cary v. Commissioner*, 880 F.2d 416 (Table) (9th Cir. 1989) (citation limited by 9th Cir. R. 36-3). Accord, 10th Cir. General Order of Nov. 29, 1993, 151

(continued...)

circuit court. See *Galuska v. Commissioner,* 5 F.3d 195, 196 & n.2 (7th Cir. 1993) (citing tax court decisions).

Galuska involved facts almost identical to those presented in this case. Mr. Galuska, the taxpayer, sought a refund for overpaid taxes for 1986. He did not file a return for 1986, however, until September 19, 1991, which was approximately one-and-one-half years after the April 12, 1990 date when the Service mailed him a notice of deficiency. He sought a refund in tax court, and while that court agreed Mr. Galuska had overpaid his 1986 taxes, it concluded his claim was untimely by virtue of the two-year refund period. Id. at 195-96. The sole issue on appeal involved whether the tax court correctly applied §6512(b)-(3)(B).

The Seventh Circuit concluded that Mr. Galuska had not filed a claim within three years of the time he filed his return, and therefore, the two-year refund period under §6511(b)(2)(B) applied. Id. at 196. Because Mr. Galuska had paid the taxes for which he sought a refund before the two-year refund period from the date the notice of deficiency was mailed, "Section 6512(b)-(3)(B) preclude[d] any refund of his overpayment." Id. We agree with our sister circuit's holding and analysis of this issue and the result it dictates in our case.

II.

We would be remiss, however, if we did not address one additional argument advanced by Ms. Richards. She contends, as did Mr. Galuska, that if she had sought a refund in federal district court, her claim would have been timely and she would be entitled to a refund. She asserts that in federal district court, her return, which was filed on January 23, 1991, would constitute a claim for

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[6](...continued)
F.R.D. 470 (disfavoring the citation of unpublished opinions).

refund. [7] She further asserts that her 1987 taxes, which were deemed filed on April 15, 1988, would be refundable because under the three-year refund period applicable to her claim, she could seek a refund of taxes paid on or after January 23, 1988.

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[7] Under Treasury regulations, a properly executed tax return can constitute a claim for refund within the meaning of §6511. 26 C.F.R. §301.6402-3(a)(5). To constitute a claim for refund, a tax return must contain "a statement setting forth the amount determined as an overpayment and advising whether such amount shall be refunded to the taxpayer or shall be applied as a credit against the taxpayer's estimated income tax" for the succeeding tax year Id. Both Ms. Richards' tax return and the accompanying letter to the Service satisfy this additional requirement.

Moreover, when the combined return/claim for refund is filed past the original due date for the filing of a tax return, an interpretive ruling of the Service indicates the claim satisfies the three-year filing period of §6511(a). See Rev. Ruling 76-511, 1976-2 C.B. 428. This ruling gives the following facts as an example:

> On April 30, 1976, A filed a 1972 Federal income tax return showing an overpayment of tax.
>
> . . .
>
> In this case, A filed a claim for refund within the 3-year period of limitation prescribed by section 6511(a) of the Code, because, under section 301.6402-3 of the regulations, A's 1972 income tax return was a claim for refund." Rev. Ruling 76-511, 1976-2 C.B. 428-29. In other words, if a claim is filed simultaneously with a return, then the courts that have considered this issue have almost unanimously held the claim is considered filed within three years from the filing of the return even though the return was due years earlier. See, e.g., *Domtar Newsprint Sales Ltd. v. United States*, 435 F.2d 563, 564-67 (Ct. Cl. 1970); *Blatt v. United States*, 830 F. Supp. 882, 885 (W.D.N.C. 1993); *Becker v. Department of Treasury/I.R.S.*, 823 F. Supp. 231, 232 (S.D.N.Y. 1993); *Mills v. United States*, 805 F. Supp. 448, 450 (E.D. Tex. 1992); *England v. United States*, 760 F. Supp. 186, 187 (D. Kan. 1991). But see *Miller v. United States*, 93-1 U.S.T.C. ¶50,018 (W.D. Wash. Dec. 1, 1992) (holding the 3-year filing period of §6311(a) does not apply to late tax return filings and citing two decisions from the same district).

Thus, her argument goes, it would be inequitable to find the refund claim viable in federal district court but not in tax court.

Mr. Galuska unsuccessfully advanced the same argument before the Seventh Circuit. The court analyzed the relevant statutory provisions and stated if the refund had been sought in federal district court, then Mr. Galuska would be entitled to the three-year refund period as of September 19, 1991, the date his return was actually filed. Id. at 197. *On the facts of that case*, however, the taxes for which he sought a refund were deemed paid on April 15, 1987, which was outside of the three-year refund period. Id. Moreover, in a footnote in an earlier section of the opinion, the court stated:

> In view of Section 6512(b)(3), a taxpayer who asks the Tax Court for a refund of an overpayment is treated the same as if he had brought a refund suit in the district court, so that there is no advantage in choosing one forum over the other.

Id. at 196 n.1.

We call attention to these portions of the *Galuska* opinion to emphasize what we perceive to be the fact-intensive nature of this analysis. While Mr. Galuska would not have gained an advantage in choosing federal district court as opposed to tax court, Ms. Richards' case intimates a different conclusion. If Ms. Richards' claim had been brought in federal district court, we would have agreed with her position that the three-year refund period applied under §6511(b)(2)(A) and the taxes she overpaid would have been refundable.

Thus, while the facts of *Galuska* suggest "no advantage" to choosing a particular forum to litigate this issue, see *Galuska*, 5 F.3d at 196 n.1, the facts of Ms. Richards' case suggest a contrary result. Furthermore, while we recognize the potential inequities and ramifications when the outcome may be dependent on the forum in which the case was litigated, cf. *Erie R.R. Co. v.*

Tompkins, 304 U.S. 64 (1938), our task is not to scrutinize the wisdom underlying the laws enacted by the representative branches of government.

Our only means of discerning whether Congress "intended" this particular result is our authority to interpret and effectuate the plain language of these tax refund limitation statutes. Although we find the statutes and their cross-references somewhat convoluted, their import is clear to us and compels the conclusion we have reached in this case, notwithstanding the fact that a contrary result may have been reached had this case been litigated in a different forum.

CONCLUSION

The tax court correctly denied Ms. Richards' claim for a refund pursuant to §6512(b)(3)(B) because the taxes for which she sought a refund were paid outside of the two-year refund period and were therefore nonrefundable. Accordingly, we AFFIRM the judgment of the tax court denying Ms. Richards' claim.

APPENDIX B

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JANE M. RICHARDS, f/k/a JANE M. MORGAN, Petitioner-Appellant, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	No. 93-9016 (T.C. No. 1564-91)

ORDER
Entered December 15, 1994

Before SEYMOUR, Chief Judge, McWILLIAMS, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, and HENRY, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on

the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court
PATRICK FISHER, Clerk of the Court

By /s/ L. Balzana
Deputy Clerk

APPENDIX C

T.C. Memo. 1993-102

UNITED STATES TAX COURT

JANE M. RICHARDS, f.k.a. JANE M. MORGAN, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 1654-91. Filed March 24, 1993

Kevin L. Brown, for petitioner.

Christopher L. Neal, for respondent.

Memorandum Opinion

JACOBS, Judge: Respondent determined a deficiency in and additions to petitioner's Federal income taxes for 1987 as follows:

	Additions to Tax		
Deficiency	Sec. 6651(a)(1)	Sec. 6653(a)(1)(A)	Sec. 6653(a)(1)(B)
$15,407	$867.75	$770.35	1/

1/ 50 percent of the interest payable under sec. 6601 with respect to the portion of the underpayment attributable to negligence.

Respondent concedes that there is no deficiency for 1987 and that petitioner is not liable for any of the additions to tax. The only issue presented for decision is whether petitioner's claim for a $15,289 tax refund is barred by the time limitations specified in sections 6511 and 6512(b)(2).

All section references are to the Internal Revenue Code.

Background

All the facts have been stipulated. The stipulation of facts and attached exhibits are incorporated herein by this reference.

Petitioner, an accountant, resided in Colorado at the time her petition was filed in this case. She and her husband, H. Glenn Richards, filed a joint Federal income tax return for 1987 on January 23, 1991, which was after the statutory notice of deficiency was mailed on October 22, 1990. The return, which claimed a $15,289 overpayment to be refunded, was accepted as filed by respondent. Petitioner's 1987 Federal income tax payments consisted of $14,131 in withheld taxes and $1,158 in excess Social Security taxes withheld, or total payments of $15,289. These taxes were deemed paid on April 15, 1988. No taxes were paid after the notice of deficiency was mailed, and no claim for refund was filed before the notice of deficiency was mailed.

Discussion

Petitioner claims entitlement to a refund of $15,289; respondent contends such refund is barred by the statute of limitations. Petitioner posits her refund is not barred by the statute of limitations because she timely filed a claim for refund for the overpayment of taxes deemed paid on April 15, 1988. She asserts that the 3-year period preceding the filing of the refund claim (January 23, 1988, to January 23, 1991) includes the taxes deemed paid on April 15, 1988, and, therefore, the period of limitations provided in section 6511(b)(2)(A) applies. To the contrary, respondent contends that section 6511(b)(2)(B) controls, when applied in conjunction with section 6512(b)(2)(B). We agree with respondent.

Section 6511(a) provides, generally, that a claim for credit or refund of an overpayment of tax must be filed by the taxpayer within 3 years from the time the return was filed or within 2 years from the time the tax was paid, whichever period expires later.

Section 6511(a) also expressly provides that, if no return is filed, the claim must be filed within 2 years from the time the tax was paid. Section 6511(b)(2) provides limitations on the amount of any credit or refund, as follows:

> (A) LIMIT WHERE CLAIM FILED WITHIN 3-YEAR PERIOD.--If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. If the tax was required to be paid by means of a stamp, the amount of the credit or refund shall not exceed the portion of the tax paid within the 3 years immediately preceding the filing of the claim.
>
> (B) LIMIT WHERE CLAIM NOT FILED WITHIN 3-YEAR PERIOD.--If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.
>
> (C) LIMIT IF NO CLAIM FILED.--If no claim was filed, the credit or refund shall not exceed the amount which would be allowable under subparagraph (A) or (B), as the case may be, if claim was filed on the date the credit or refund is allowed.

Pursuant to section 6512, we have jurisdiction to determine the existence and amount of any overpayment of tax to be credited or refunded to a taxpayer for years that are properly before us. Like section 6511(b)(2), however, section 6512(b)(2) provides limitations on the amount of any credit or refund. Section 6512(b)(2) provides:

(2) LIMIT ON AMOUNT OF CREDIT OR REFUND. No such credit or refund shall be allowed or made of any portion of the tax unless the Tax Court determines as part of its decision that such portion was paid--

(A) after the mailing of the notice of deficiency,

(B) within the period which would be applicable under section 6511(b)(2), (c), or (d), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment, or

(C) within the period which would be applicable under section 6511(b)(2), (c), or (d), in respect of any claim for refund filed within the applicable period specified in section 6511 and before the date of the mailing of the notice of deficiency--

(i) which had not been disallowed before that date,

(ii) which had been disallowed before that date and in respect of which a timely suit for refund could have been commenced as of that date, or

(iii) in respect of which a suit for refund had been commenced before that date and within the period specified in section 6532.

The issue confronting us here was thoroughly considered, analyzed, and decided in our recent opinion in Allen v. Commissioner, 99 T.C. -- (1992), on appeal (6th Cir., Feb. 16, 1993). The Allen opinion controls the disposition of this case. See also

Galuska v. Commissioner, 98 T.C. 661 (1992); Berry v. Commissioner, 97 T.C. 339 (1991), and several memorandum opinions cited therein at 345 n.7.

Section 6512(b)(2)(B) tests the applicable limitations period of section 6511 against a hypothetical claim for refund filed on the date the notice of deficiency was mailed. Thus, the focus here is the applicable "look-back" period as measured from October 22, 1990. A refund claim made on October 22, 1990, would be timely for a return filed on or after October 22, 1987, or taxes paid on or after October 22, 1988. Petitioner did not file her Federal income tax return during the 3-year period from October 22, 1987, to October 22, 1990, nor were her taxes for 1987 paid on or after October 22, 1988. Petitioner filed her 1987 return on January 23, 1991, and the taxes creating the overpayment for 1987 are deemed paid on April 15, 1988. Consequently, the payments do not fall within the 3-year period applicable under section 6511(b)(2)(A), and petitioner is not eligible for an overpayment of amounts paid within 3 years plus the period of any extensions.

Petitioner's withheld tax payments also do not fall within the 2-year period of section 6511(b)(2)(B). Her taxes for 1987 were deemed paid on April 15, 1988, approximately 2 years and 6 months prior to October 22, 1990, the date the notice of deficiency was mailed. That date falls outside the 2-year period of section 6511(b)(2)(B). See White v. Commissioner, 72 T.C. 1126 (1979).

Petitioner's reliance on Dillard v. Commissioner, T.C. Memo. 1992-126, is misplaced. As we said in Allen v. Commissioner, supra at ___ (slip op. at 11):

> Although there is some language in Dillard that superficially appears to support petitioner, the ultimate result reached there was against the taxpayer, and we do not regard that case as in point here.

Other cases, and a revenue ruling, cited by petitioner are either distinguishable or not controlling.

Conclusion

We conclude that no refund of any part of any overpayment for the 1987 taxable year is allowable. Therefore, we hold that petitioner is not entitled to a refund for overpayment of her 1987 income taxes because her claim for refund is barred by the statute of limitations. [1]

To reflect the foregoing and respondent's concessions,

Decision will be entered for petitioner as to the deficiency and additions to tax and for respondent as to the overpayment.

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[1] We note that we have jurisdiction by virtue of the notice of deficiency and the timely petition filed herein. The fact that sec. 6512(b)-(2)(B) in essence denies petitioner's entitlement to an overpayment does not negate our jurisdiction.

Supreme Court, U.S.
FILED
OCT 14 1995
OFFICE OF THE CLERK

No. 94-1537

In the Supreme Court of the United States

OCTOBER TERM, 1994

JANE M. RICHARDS, F.K.A.
JANE M. MORGAN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether 26 U.S.C. 6512(b)(3)(B) bars a taxpayer from obtaining a refund of an overpayment of income taxes in a Tax Court case (i) when she failed to file a return for more than two years after the return was due and (ii) then filed her return only after the Commissioner issued the notice of deficiency that led to the Tax Court litigation.

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In the Supreme Court of the United States

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COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 37 F.3d 587. The opinion of the Tax Court (Pet. App. 13a-18a) is reported at 65 T.C.M. (CCH) 2137.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1994. The petition for rehearing with suggestion for rehearing en banc was denied on December 15, 1994 (Pet. App. 11a-12a). The petition for a writ of certiorari was filed on March 14, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The applicable provisions of Sections 6511 and 6512 of the Internal Revenue Code, 26 U.S.C. 6511, 6512, are set forth at Pet. 2-5.

STATEMENT

1. Although federal income taxes were withheld from petitioner's wages during 1987, she failed to file an income tax return for that year when it was due, on April 15, 1988. More than two years later, on October 22, 1990, in the absence of any return from petitioner, the Commissioner of Internal Revenue mailed petitioner a notice of a deficiency of $15,507 in her income taxes for 1987. Three months later, on January 23, 1991, petitioner filed a joint income tax return for 1987 with her husband. That untimely return asserted a $15,289 overpayment of their joint income tax liability for 1987 (Pet. App. 2a).

2. a. On the same day that petitioner filed her belated return, she sought a redetermination in the Tax Court of the deficiency asserted by the Commissioner in her 1987 income taxes. Petitioner thereafter amended her Tax Court pleadings to request a determination that she had overpaid her 1987 taxes by $15,289. Upon review of the information contained in petitioner's untimely return of January 23, 1991, the Commissioner stipulated in the Tax Court that a deficiency did not exist in petitioner's 1987 taxes. The Commissioner further stipulated that petitioner had, in fact, made an overpayment of $15,289 in the taxes that she owed for that year (Pet. App. 2a).

Following these stipulations, the only issue remaining in the Tax Court was whether petitioner was entitled to a refund of the $15,289 overpayment. The Commissioner contended that a refund of the overpayment was barred by the provisions of Sections 6511 and 6512 of the

Internal Revenue Code, 26 U.S.C. 6511, 6512 (Pet. App. 13a).

b. The Tax Court agreed with the Commissioner that Sections 6511 and 6512 bar any recovery upon petitioner's refund claim (Pet. App. 13a-18a). The court noted that Section 6512(b)(3)(B) limits the amount of any overpayment that may be refunded in a Tax Court case to the amount that would have been refundable under Section 6511(b)(2) if a claim for refund had been filed by the taxpayer "on the date of the mailing of the notice of deficiency" (Pet. App. 16a, quoting 26 U.S.C. 6512(b)(3)(B)). As the court explained, Section 6512(b)(3)(B) "tests the applicable limitations period of [S]ection 6511 against a hypothetical claim for refund filed on the date the notice of deficiency was mailed" (Pet. App. 17a). Because, as of the date the notice of deficiency was mailed, petitioner had not filed a return for her 1987 taxes, the amount of the overpayment of tax that was refundable to her was the amount of tax she had paid within the two-year period immediately preceding the date that the notice of deficiency was mailed (*ibid.*, citing 26 U.S.C. 6511(b)(2)(A) and (B)). Since petitioner had not paid any of the taxes involved in this case during the two-year period preceding the notice of deficiency, the court concluded that Section 6512(b)(3)(B) bars any refund of petitioner's overpayment (Pet. App. 18a).

3. Noting that several other circuits have upheld the Tax Court's analysis of these statutory provisions,[1] the court of appeals affirmed (Pet. App. 1a-10a). The court

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[1] See, *e.g.*, *Davison* v. *Commissioner*, 9 F.3d 1538 (2d Cir. 1993) (Table) (unpub.), aff'g 64 T.C.M. (CCH) 1517 (1992); *Allen* v. *Commissioner*, 23 F.3d 406 (6th Cir. 1994) (Table) (unpub.), aff'g 99 T.C. 475 (1992); *Galuska* v. *Commissioner*, 5 F.3d 175 (7th Cir. 1993); Pet. App. 6a n.6.

explained that, under Section 6512(b)(3)(B), the notice of deficiency operates as a refund claim for taxpayers who had not previously filed one. Under Section 6511(b)(2)—which is incorporated by reference for this purpose by Section 6512(b)(3)(B)—the amount of any refund is limited by the amount of the disputed taxes that the taxpayer paid either (i) within the two-year period prior to the date of the refund claim (26 U.S.C. 6511(b)(2)(B)) or, (ii) if the refund claim was made "within 3 years from the time the return was filed," within the three-year period prior to the date of the refund claim (26 U.S.C. 6511(a), incorporated by reference in 26 U.S.C. 6511(b)(2)(A)).

The court concluded (Pet. App. 5a-6a) that, because petitioner did not file her return until *after* the notice of deficiency was issued, the imputed refund claim that arose upon issuance of the notice of deficiency under Section 6512(b)(3)(B) did not occur "within 3 years from the time the return was filed." The court held that, under Section 6512(b)(3)(B), petitioner therefore could recover only the portion of the overpayment of the disputed taxes that she made during the two-year period prior to the refund claim (under Section 6511(b)(2)(B))—rather than the three-year period prior to the refund claim (under Section 6511(b)(2)(A)). Petitioner acknowledged that no portion of the overpayment had been paid within this two-year period. The court therefore held that petitioner was barred by the statute from obtaining a refund of her overpayment (Pet. App. 6a, 10a).

ARGUMENT

The court of appeals correctly held that petitioner was barred from obtaining a refund of her overpayment under Section 6512(b)(3)(B) of the Internal Revenue Code. We agree with petitioner, however, that this case presents a

recurring question of substantial administrative importance on which there is a direct conflict among the courts of appeals. Review by this Court is therefore warranted.

1. When a taxpayer has petitioned the Tax Court for review of a deficiency asserted by the Commissioner, Section 6512(b)(1) of the Internal Revenue Code authorizes the Tax Court not only to review the claimed deficiency but also to determine the amount of any overpayment that the taxpayer may have made. Any overpayment so determined is to be credited or refunded to the taxpayer, subject however to the express limitations of Section 6512(b)(3). See 26 U.S.C. 6512(b)(1). Because the existence of an overpayment was conceded in this case, the amount of the refund to which petitioner is entitled turns solely on the correct application of the refund limitations contained in Section 6512(b)(3).

Section 6512(b)(3)(B) limits the amount of any refund of an overpayment to the amount that would have been refundable under Section 6511(b)(2) if a claim for refund had been filed by the taxpayer "on the date of the mailing of the notice of deficiency" (26 U.S.C. 6512(b)(3)(B)).[2] As the Tax Court explained in this case, Section 6512(b)(3)(B) "tests the applicable limitations period of Section 6511 against a hypothetical claim for refund filed on the date the notice of deficiency was mailed" (Pet. App. 17a).[3]

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[2] Paragraph (3) of Section 6512(b) has three subparagraphs. Section 6512(b)(3)(B) is the one applicable to this case: Section 6512(b)(3)(A) does not apply because no payments were made by petitioner after the notice of deficiency was mailed; Section 6512(b)(3)(C) does not apply because no claim for refund was filed by petitioner before the notice of deficiency was mailed. See 26 U.S.C. 6512(b)(3)(A)-(C).

[3] The applicable period involved in this case is that specified in Section 6511(b)(2). Section 6511(c) and (d), which is also in-

As the court of appeals explained (Pet. App. 5a-7a), under Section 6511(b)(2)—which Section 6512(b)(3)(B) incorporates by reference—the amount of any refund is limited by the amount of the disputed taxes that the taxpayer paid either (i) within the two-year period prior to the date of the refund claim (26 U.S.C. 6511(b)(2)(B)) or, (ii) if the refund claim was made "within 3 years from the time the return was filed," within the three-year period prior to the date of the refund claim (26 U.S.C. 6511(a), incorporated by reference in 26 U.S.C. 6511(b)(2)(A)). As the court noted, since the notice of deficiency, and thus the imputed refund claim of the taxpayer (under Section 6512(b)(3)), occurred *before* petitioner filed her return, her statutorily imputed refund claim was not filed "within 3 years *from the time* the return was filed" (Pet. App. 6a, quoting 26 U.S.C. 6511(a) (emphasis added by court)). Accord, *Galuska* v. *Commissioner*, 5 F.3d 195, 197 (7th Cir. 1993) ("at the time Galuska was deemed to have filed his claim for refund * * * he had not filed his return * * *. Therefore the 2-year period prescribed in Section 6511(a) is applicable."). Since petitioner's return was filed *after* her refund claim, the two-year, rather than the three-year, refund period applies to this case.

The taxes withheld from petitioner's 1987 income are deemed to have been paid on the date that her return for that year was due—on April 15, 1988. See 26 U.S.C.

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corporated by reference in Section 6512(b)(3)(B), is not applicable on the facts of this case: Section 6511(c) applies only when the time for assessing a tax has been extended by agreement; Section 6511(d) applies only to situations involving specific types of claims—such as bad debts, worthless securities, net operating losses, and certain credit carrybacks—that the present case does not involve. See 26 U.S.C. 6511(c) and (d) (1988 & Supp. V 1993).

6513(b)(1). Her imputed refund claim occurred more than two years after that date, on October 22, 1990 (Pet. App. 2a). Because no portion of the overpayment was paid within the two-year period preceding the notice of deficiency, petitioner was not entitled to a refund (*id.* at 6a). In *Galuska* v. *Commissioner*, 5 F.3d at 196, the Seventh Circuit reached the same conclusion on identical facts. See also cases cited note 1, *supra*.

2. Petitioner is correct in noting (Pet. 9) that the Fourth Circuit's recent decision in *Lundy* v. *Internal Revenue Service*, 45 F.3d 856 (1995), directly conflicts with the decision in this case.[4] *Lundy* also conflicts with the Second Circuit's decision in *Davison* v. *Commissioner*, 9 F.3d 1538, the Sixth Circuit's decision in *Allen* v. *Commissioner*, 23 F.3d 406, the Seventh Circuit's decision in *Galuska* v. *Commissioner*, 5 F.3d 975, and the Ninth Circuit's decision in *Rossman* v. *Commissioner*, 46 F.3d 1144 (1995) (Table) (unpub.), aff'g 66 T.C.M. (CCH) 336 (1993).

Prior to the Fourth Circuit's decision in *Lundy*, the courts had unanimously rejected the contention that an untimely return, filed after the notice of deficiency, may permit application of the three year refund period under Section 6512(b)(3)(B). See *Galuska* v. *Commissioner*, 5 F.3d at 196 ("[a]t least twelve other Tax Court decisions are in accord, and we discovered no case that is *contra*"); see also *id.* at 196 n.2; Pet. App. 6a n.6. Expressly rejecting the consistent view of these other courts, however, the Fourth Circuit held in *Lundy* that a taxpayer who filed his tax return for the year in issue after he had been issued a notice of deficiency, and more than two years after he paid the taxes giving rise to the

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[4] We intend to file a petition for a writ of certiorari in *Lundy* on or before May 1, 1995.

overpayment, was not barred by Section 6512(b)(3)(B) from obtaining a refund of his overpayment in Tax Court. 45 F.3d at 861-862. Without squarely confronting the words of the statute, the court in *Lundy* relied on what it perceived to be evidence in "the legislative history of § 6512 [that] indicates that Congress intended a taxpayer who filed a claim for refund within three years of filing a tax return to have a three-year refund period that runs from the date of the mailing of the notice of deficiency." 45 F.3d at 863. Based on this reading of the legislative history, the court in *Lundy* stated (*ibid.*):

> We interpret § 6512(b)(3)(B) to provide for a three-year refund period where the taxpayer files a claim for refund in Tax Court within three years of filing his tax return and to commence the refund period from the date of the mailing of the notice of deficiency.

In reaching that conclusion, the court in *Lundy* also relied on what it perceived to be the potential anomaly that "Lundy would have received his refund if he had filed his claim for refund in a United States district court or the United States Claims Court." 45 F.3d at 860. The court assumed in making this assertion that a return filed by a taxpayer more than two years after the return is due would permit a *subsequent* refund claim to invoke the three-year refund period of Section 6511(b)(2)(A). That assumed result, of course, has no direct relevance to the proper interpretation of the plain language of Section 6512(b)(3)(B). Moreover, the court's assumption that the same taxpayer would fare differently in a refund suit in the Court of Federal Claims or in federal district court than in the Tax Court has been squarely rejected by the Ninth Circuit in *Miller* v. *United States*, 38 F.3d 473 (1994). In *Miller*,

the court ruled that, when a return is not filed within "two years after the date of payment," the taxpayer's claim—whether brought in the Court of Federal Claims, federal district court *or* in the Tax Court—is barred by Section 6511(a). See 38 F.3d at 476. The court explained in *Miller* that an untimely return filed more than two years after the date of payment "cannot resurrect the three-year period" (*id.* at 475):

> If the clock were to run only from the filing of the return, no claim would ever be barred as long as the return was not filed. * * * The point at which one must determine whether a return has or has not been filed, for purposes of [Section 6511(a)], must be two years after payment. Otherwise, no claim could ever finally be barred by the two-year-after-payment clause because the taxpayer could at any time file a return and have three more years to assert the claim.

See also *Oropallo* v. *United States*, 994 F.2d 25, 30 (1st Cir. 1993) ("We have assumed [for the sake of argument] that a return can be filed at any time after its due date and still be a return for purposes of filing a claim within that three-year period. Under that interpretation, the limitations period in section 6511(a) is totally illusory."), cert. denied, 114 S. Ct. 705 (1994).[5]

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[5] Revenue Ruling 76-511, 1976-2 C.B. 428, assumes that, if (i) a return is filed more than two but less than three years after it is due and (ii) a refund claim is filed contemporaneously or subsequently, "the refund would [be] allowable since the overpayment would have been made within the 3-year period immediately preceding the filing of the claim." *Id.* at 429. That Ruling is inconsistent with the court of appeals' conclusion in *Miller*. See 38 F.3d at 475. In light of the reasoning set forth in *Miller* and in *Oropallo*, however, the Service advises us that the Commissioner is reconsidering her position under Ruling 76-511.

The decision in *Lundy* directly conflicts with the decisions of five other circuits. Moreover, as the courts explained in this case and in *Galuska*, the decision in *Lundy* cannot be reconciled with the plain language of Section 6512(b)(3)(B). Finally, the reasoning of the court in *Lundy* is based upon an asserted inconsistency in the treatment of refund claims brought in the Tax Court—as contrasted with refund suits in other courts—that the court in *Miller* concluded does not exist.

3. The conflict that exists among the courts of appeals on the question presented in this case is a recurring one of substantial administrative importance. As the court noted in *Lundy*, in expressly disagreeing with the decisions of other circuits, this issue arises with substantial frequency and has been the subject of repetitive litigation. See 45 F.3d at 864-868. The frequency of such litigation will, of course, be augmented even further by the direct conflict that now exists on this issue.

Because of the conflict among the circuits, taxpayers who reside in the Fourth Circuit will obtain refunds of overpayments that similarly-situated taxpayers who reside in the Second, Sixth, Seventh, Ninth and Tenth Circuits will be denied. Review by this Court of the decision in this case is needed to avoid continuing uncertainty and inconsistent application of the revenue laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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